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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCO ANTONIO CRUZRIVERA,

Defendant and Appellant.

H045463

(Santa Clara County

Super. Ct. No. C1632784)

I. INTRODUCTION

Defendant Marco Antonio Cruzrivera¹ appeals after a jury found him guilty of one count of sexual penetration of a child 10 years of age or younger (Pen. Code, § 288.7, subd. (b)),² five counts of committing a lewd or lascivious act on a child under the age of 14 (§ 288, subd. (a)), and one count of continuous sexual abuse of a child under the age of 14 (§ 288.5). The trial court sentenced defendant to 41 years to life.

Defendant contends on appeal that the trial court erred when it admitted evidence on Child Sexual Abuse Accommodation Syndrome (CSAAS) and that his trial counsel was ineffective for failing to object to the prosecutor's closing argument regarding the CSAAS evidence. For reasons that we will explain, we will affirm the judgment.

¹ The record on appeal also contains documents that refer to defendant as "Marco Antonio Cruz Rivera."

² All further statutory references are to the Penal Code unless otherwise indicated.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Prosecution Case

Adriana lived in a house on Tampa Way in San Jose with her parents, her siblings, and her extended family, which included two uncles, an aunt, a niece, and her father's cousin.³ Defendant is one of Adriana's uncles. Defendant slept on the living room couch.

1. Count 1: Sexual Penetration of a Child 10 Years or Younger (§ 288.7, subd. (b))

When Adriana was nine or ten years old, during the summer between fourth and fifth grade, defendant told her to sit on his lap. Defendant and Adriana were in the living room; her parents were in their room. Adriana sat on defendant's lap and defendant started to touch her breasts over her clothes. Defendant then "started going under [her] shirt," with his fingers spread and rubbing over her body. Adriana felt too uncomfortable to say anything. Defendant moved his hand into Adriana's pants and digitally penetrated her vagina. It felt like he was "poking in there and it hurt." Adriana did not say anything to him because she did not know what he was doing and she was scared. Defendant also touched Adriana on her "bottom," but he did not penetrate her anus. At some point, defendant told Adriana not to tell anyone and let her go. Adriana did not tell anyone about what happened because she did not think they would believe her.

2. Count 2: Lewd or Lascivious Act on A Child Under Age 14 (§ 288, subd. (a))

A few weeks later, defendant again called Adriana over to him in the living room. Adriana felt uncomfortable but she went to him anyway and sat on his lap. Defendant touched Adriana's breasts under her shirt and put his hands on her bottom. Defendant put his hands in Adriana's underwear and touched the outside of her vagina. Defendant

³ We refer to Adriana and her family members by their first names to protect Adriana's privacy interests. (See Cal. Rules of Court, rule 8.90(b)(11).)

grabbed Adriana's hand and "made [her] touch his private part." At some point defendant zipped up his pants and let her go.

3. Count 3: Lewd or Lascivious Act on A Child Under Age 14 (§ 288, subd. (a))

On some later date, before Adriana started middle school, defendant touched her when they were outside. Defendant was in the backyard on the side of the house where there were no windows, and he called Adriana over to him. Defendant touched Adriana's breasts, pulled down her pants and underwear, and touched her bottom. Defendant stopped when he heard someone coming.

4. Count 4: Continuous Sexual Abuse of a Child Under Age 14 (§ 288.5, subd. (a)) and Counts 5-7: Lewd or Lascivious Act on A Child Under Age 14 (§ 288, subd. (a))

Adriana's father, Jose, began taking Adriana to school everyday when she started middle school. Defendant would go with them because after Adriana was dropped off at school, defendant and Jose would go to work.

Around the time Adriana was in the fifth or sixth grade, her father got a new truck. The new truck had a bench seat, and Adriana would sit in between her father and defendant on the seat. During the ride to school, defendant would cross his arms and stroke the right side of Adriana's arm and the side of her breast with his hand. Adriana would try to move as far away from him as possible. Defendant did this "[a]lmost everyday." When they arrived at school, defendant would sometimes grab the upper part of Adriana's right thigh and would try to touch her crotch area when she was exiting the truck. That happened "[a]t least twice a week." Sometimes Jose would pick Adriana up from school, too, and defendant would "touch [her] inappropriately" on the way home about "once a week."

Once, Adriana was moving around on the seat and Jose saw Adriana elbow defendant. Jose told defendant and Adriana to stop moving and told Adriana to "act

peacefully.” Adriana did not tell her father what was happening because she did not think he would take her seriously and she felt like he had a closer relationship with defendant than her.

5. Disclosure of Abuse

Eventually, Adriana told her friends Irene, Daniela, Thuy, and her two friends named Fernanda because she felt like she needed to tell someone and she trusted them. Adriana told them about the incident with defendant that “happened when [she] was younger” and what was happening in the truck. Adriana also told her friends that she felt uncomfortable when her father was rubbing ointment on the side of her ribs to treat an injury. Adriana “felt weird” when anybody got near her because she felt like she could not trust anyone.

Adriana talked to her friends for two days about what was happening with defendant before she told her school principal, Sasana Mena. Adriana told Mena that she felt unsafe around her uncle because he had touched her and it made her feel uncomfortable. Adriana said that “it used to happen, then it stopped, and then it started again.” The most recent touching occurred when her father took her to school in the morning. Adriana stated that her uncle “ ‘sneakingly’ ” touched her and rubbed her while her dad was focused on driving.

Mena reported the disclosure to Adriana’s parents and to Child Protective Services (CPS). Adriana’s parents came to the school, and Mena told them about the molestation. Adriana was relieved that Mena was the one who told them instead of her.

After speaking with Mena, Jose confronted defendant about Adriana’s allegations. Defendant did not say anything in response and had a blank stare on his face.

Adriana and her parents went to the CPS office, where Adriana was interviewed by a CPS case worker and then a police officer about what happened. Adriana did not mention anything about her father to the case worker or the police officer.

San Jose Police Officer Daniel Ichige later questioned Adriana about her disclosure to her friends. Irene, Daniela, and one of the Fernandas had told him that Adriana's father may have been involved in the molestation. Adriana told Officer Ichige that her father had treated her for a rib injury.

6. Expert Testimony

Clinical psychologist Blake Carmichael testified as an expert on CSAAS. Carmichael explained that he was testifying to "educate the jury about kids who have been sexually abused" because "they act in ways that people may not anticipate" and there are "a lot of misconceptions about how kids might act after they [have been] abused." Carmichael stated that he had not reviewed the police reports in the case and had not spoken to the victim or any of the witnesses.

CSAAS was "originally written about in 1983 by Dr. Roland Summit," and it "helps people understand . . . that . . . abuse happens within the context of a relationship." Children are rarely abused by someone they do not know. CSAAS is an educational tool that describes what is known about children who have been sexually abused. It is not used to determine whether a child has been abused.

CSAAS has five characteristics: secrecy, helplessness, entrapment or accommodation, delayed and unconvincing disclosure, and retraction or recanting. Carmichael stated that all five characteristics are not present in every instance of abuse.

Secrecy relates to the perpetrator's ongoing access to the child and the perpetrator's ability to maintain secrecy about the abuse through the use of overt or coercive threats or the child's fear that something bad will happen if he or she discloses. Secrecy can be maintained even if people are available for the child to talk to.

Helplessness refers to a child's physical and emotional vulnerability to being abused by someone that he or she believes is supposed to care for and protect them, and the child's belief that if he or she discloses the abuse, he or she will not be believed.

Entrapment or accommodation pertains to coping mechanisms used by child victims of sexual abuse. Child victims may take ineffective actions to avoid the abuser, such as going a different route to school or dressing differently, and may dissociate to cognitively and emotionally tune out the abuse. Children may be resigned to the abuse if they feel they are unable to stop it. Children may feel fear, shame, guilt, or embarrassment when reminded of the abuse.

Delayed and unconvincing disclosure refers to the fact that most children do not immediately disclose sexual abuse and there are often long delays between the abuse and the disclosure. “[U]nconvincing disclosure” focuses on people’s expectation that children will disclose all of the abuse at once and describe the abuse consistently every time, when children may only give a few details at first because they are fearful and ashamed or they do not trust the person asking them about the abuse. Children will often disclose the details of the abuse incrementally. The more often a child is abused, the more difficult it is for him or her to remember the details of each instance of abuse.

Retraction or recanting relates to the fact that sometimes children will retract their statement that abuse occurred because of family pressure, ongoing contact with their abuser, fear, or awareness of the negative consequences to their family of the disclosure.

B. *Defense Case*

Defendant’s sister-in-law, Yesenia, testified that she met Adriana in June 2011. Yesenia moved into the family’s home on Tampa Way during the summer of 2014. Defendant interacted with all of the children in the household the same way; he did not treat Adriana differently.

Defendant left for work with Jose around 7:30 a.m. and returned home around 6:00 or 6:30 p.m. Defendant would never stay home from work. The only time he would not go to work was if it was raining because he worked for a roofing company. Yesenia never saw anything unusual when Jose, Adriana, and defendant would get into Jose’s truck. Adriana never appeared reluctant to get into the truck.

Yesenia had caught Adriana lying multiple times. Adriana lied once to her friends on social media. Adriana also lied about having to take some Chinese food to school for a science project.

Yesenia had observed Adriana and her mother treat defendant unfairly. Prior to the allegations of abuse, Adriana and her mother had a typical mother-daughter relationship. After Adriana made the allegations against defendant, their relationship became more like a friendship.

On cross-examination, Yesenia stated that she did not live in the Tampa Way house when Adriana was 9 or 10 years old. She also testified that she was never inside the truck with Jose, Adriana, and defendant when Adriana was being taken to school.

Defendant's brother, Pedro, testified that he caught Adriana lying to her parents "a few times." Pedro stated that defendant was usually out of the house during the day.

C. *Rebuttal*

Nancy Castro was a CPS social worker in March 2016. She met with Adriana and her family on March 7, 2016. Jose told Castro that after he learned of Adriana's disclosure, he went home and told defendant that he was being accused of molesting Adriana. Jose stated that defendant did not say anything when he was confronted; he stayed quiet. It appeared to Castro that Jose was conflicted about the situation.

Castro also spoke to Adriana. She was reserved and seemed embarrassed. She did not want to tell Castro what had happened. She was also worried that if she disclosed the abuse, it would cause a rift in the family and she did not want to get into trouble. Castro was able to establish a rapport with Adriana and she began to disclose the abuse.

Adriana told Castro that defendant started touching her when she was 9 or 10 years old, which was three years before she disclosed. Adriana stated that defendant used his fingers to touch her vaginal area and that he would use his fingers to "stab" her vagina. She also said he would try to hug her and touch her "front part." Defendant tried to touch the side of her breast when they were in the truck on the way to school. Adriana

told Castro that defendant would also touch her leg and crotch when she was getting out of the truck. Adriana did not know how to react to the touching and felt confused.

D. *Charges, Verdict, and Sentence*

Defendant was charged with two counts of sexual penetration of a child 10 years of age or younger (§ 288.7, subd. (b); counts 1 and 2), four counts of committing lewd or lascivious acts on a child under the age of 14 (§ 288, subd. (a); counts 3, 5, 6, and 7), and one count of continuous sexual abuse of a child under the age of 14 (§ 288.5, subd. (a); count 4). During trial, the court granted the prosecution's motion to amend count 2 to a fifth count of committing lewd or lascivious acts on a child under the age of 14 (§ 288, subd. (a)).

A jury found defendant guilty of all counts. The trial court sentenced defendant to 41 years to life.

III. DISCUSSION

A. *Admission of CSAAS Evidence*

Defendant contends that the trial court abused its discretion and violated his right to due process when it admitted evidence on CSAAS. Defendant argues that the evidence was not relevant because “there are no longer misconceptions to correct” regarding the conduct of child sex abuse victims and Adriana's credibility issues did not render the evidence relevant. Defendant also contends that the trial court improperly allowed the expert witness to answer hypothetical questions that tracked the facts of the case, thereby implying that Adriana's testimony was consistent with CSAAS.

1. Trial Court Proceedings

Defendant moved in limine to exclude CSAAS evidence. Defendant asserted that the evidence should be excluded under Evidence Code section 352 as irrelevant and unduly prejudicial because “[t]his is not a case in which any trier of fact needs to be ‘disabused’ of any ‘myth.’ ” Defendant also requested the trial court to instruct the jury “not to use th[e] evidence to predict a molest has been committed” if the court ruled that

the CSAAS evidence was admissible. Rather, defendant asked that the jury be instructed that “[t]he evidence is admissible solely for the purpose of showing that the victim’s reactions as demonstrated by the evidence are not inconsistent with having been molested”

The prosecution moved in limine to present CSAAS evidence. The prosecution asserted that the evidence was admissible “to provide jurors with a better understanding [of] why victims of child sexual abuse may be fearful and reluctant in disclosing sexual abuse and how that fear and reluctance may cause delay in reporting such abuse.” The prosecution argued that the evidence was relevant because Adriana delayed disclosure for five years.

The trial court denied defendant’s motion to exclude CSAAS evidence and granted the prosecution’s motion to present CSAAS evidence.

The trial court instructed the jury with CALCRIM No. 1193 after the parties rested. The court told the jury, “You have heard testimony from Blake Carmichael regarding child sexual abuse accommodation syndrome. Blake Carmichael’s testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him. You may consider this evidence only in deciding whether or not Adriana Doe’s conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of that testimony.”

2. Legal Principles

California courts have held that CSAAS evidence is admissible to disabuse jurors of commonly held misconceptions about child sexual abuse. (See *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301, fn. omitted (*McAlpin*); *People v. Gonzales* (2017) 16 Cal.App.5th 494, 503; *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745 (*Patino*); *People v. Housley* (1992) 6 Cal.App.4th 947, 955-956 (*Housley*); *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1383-1384, superseded on other grounds by CALJIC

No. 10.41, as recognized in *People v. Levesque* (1995) 35 Cal.App.4th 530, 536-537; *People v. Harlan* (1990) 222 Cal.App.3d 439, 449-450; *People v. Stark* (1989) 213 Cal.App.3d 107, 116-117; *People v. Bowker* (1988) 203 Cal.App.3d 385, 393-394 (*Bowker*.) CSAAS “evidence is admissible *solely* for the purpose of showing that the victim’s reactions as demonstrated by the evidence are not inconsistent with having been molested.” (*Bowker, supra*, at p. 394.) The need for CSAAS evidence arises when the defendant attacks the child’s credibility by suggesting that the child’s conduct after the incident, such as a delay in reporting, is inconsistent with the child’s testimony claiming molestation. (*McAlpin, supra*, at p. 1300.) CSAAS evidence may not be offered to prove that a child’s molestation claim is true. (*Ibid.*)

“ ‘The trial court has broad discretion in deciding whether to admit or exclude expert testimony [citation], and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion.’ [Citation.]” (*People v. Brown* (2014) 59 Cal.4th 86, 101.)

“Of course, only relevant evidence is admissible [citation], and relevance is defined as ‘having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action’ [citation]. The trial court has broad discretion to determine the relevance of evidence [citation], and we will not disturb the court’s exercise of that discretion unless it acted in an arbitrary, capricious or patently absurd manner [citation].” (*People v. Jones* (2013) 57 Cal.4th 899, 947.)

3. Analysis

Defendant contends that the trial court abused its discretion in admitting CSAAS evidence because the prosecution never established any juror misconceptions about the behavior of sexually abused children and, thus, the CSAAS evidence was not relevant. However, “[i]dentifying a ‘myth’ or ‘misconception’ has not been interpreted as requiring the prosecution to expressly state on the record the evidence which is inconsistent with the finding of molestation. It is sufficient if the victim’s credibility is placed in issue due

to [his or her] paradoxical behavior, including a delay in reporting a molestation. [Citations.]” (*Patino, supra*, 26 Cal.App.4th at pp. 1744-1745.)

We determine that the CSAAS evidence was relevant because Adriana’s credibility was “placed in issue due to [her] paradoxical behavior” (*Patino, supra*, 26 Cal.App.4th at p. 1744.) Defendant sought to establish that Adriana was either lying or mistaken in her claims that he had sexually assaulted her, and pointed to Adriana’s delayed disclosure, the inconsistencies in her reports of abuse, and the particular circumstances under which the abuse was reported. The CSAAS evidence was therefore relevant to demonstrate that Adriana’s reactions were not inconsistent with having been molested, where, for example, she kept the abuse secret for a period of time, did not resist or stop the abuse, and made varying statements regarding the abuse.

Defendant argues that a child sex abuse victim’s “mere[]” credibility issues do not render CSAAS evidence relevant. This oversimplifies the basis for the evidence’s admission. As the California Supreme Court has stated, the evidence “is admissible to rehabilitate such witness’s credibility when the defendant suggests that the child’s conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation. [Citations.] ‘Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children’s seemingly self-impeaching behavior.’ ” (*McAlpin, supra*, 53 Cal.3d at pp. 1300-1301, fn. omitted.) That is what occurred here. Through both questioning and argument, defendant suggested that Adriana was lying based on her delayed reporting, her failure to take action against the abuse, and her inconsistent statements regarding the abuse.

Defendant also contends that the trial court abused its discretion by allowing the expert to answer hypothetical questions that tracked the facts of this case. For example, Carmichael was asked whether it would surprise him if a 15 year old who had not received therapy and rarely talked about the abuse had difficulty recounting what

happened in front of the alleged perpetrator and people she did not know. Carmichael responded that it would not surprise him if such a child had a flat affect, froze, or had difficulty articulating what had occurred. Carmichael was also asked whether it would surprise him if a 13 year old who had just begun to disclose the abuse had a negative reaction to another family member's innocent touching. Carmichael responded that such a reaction would not surprise him because physical touch or signs of affection can be threatening to a child who has been sexually abused. The touching can be perceived as a sign that abuse is coming or remind the child of the abuse. Defendant argues that this testimony was improper as it "impl[ied] that because [Adriana] behaved in a manner consistent with CSAAS, [it] shows she was molested" and corroborated her claims of abuse.

Although some of the complained-of testimony corresponded to Adriana's ability to testify during trial and her disclosure of abuse, we conclude that the jury would not have improperly implied from Carmichael's testimony that he had diagnosed the abuse of Adriana or that he believed Adriana had been abused. Carmichael's testimony about CSAAS was directed to the behavior of children as a class and their common reactions to sexual abuse, rather than to the particular victim in this case. Carmichael testified that he did not know the facts of the case, had not spoken to the victim or any of the witnesses, and had not read the police reports. He also made clear that CSAAS was not a diagnostic tool and could not be used to determine whether a child was molested. (See *Housley*, *supra*, 6 Cal.App.4th at pp. 955-956 [concluding that it was "unlikely the jury would interpret [the expert's] statements as a testimonial to [the victim's] credibility" because the expert had testified that she had never met the victim and was unfamiliar with the particulars of the case].) Moreover, the trial court explicitly instructed the jury that "Carmichael's testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him. You may consider this evidence only in deciding whether or not Adriana Doe's conduct was not

inconsistent with the conduct of someone who has been molested, and in evaluating the believability of that testimony.” This admonishment removed the possibility that the jury might misunderstand Carmichael’s testimony or the proper use of CSAAS evidence.

For these reasons, we conclude that the trial court did not abuse its discretion when it admitted the CSAAS evidence.

4. Due Process

Defendant contends that the admission of CSAAS evidence violated his federal constitutional right to due process.

“The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant’s trial fundamentally unfair. [Citations].” (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) As we have explained, the CSAAS evidence admitted here was relevant to the issues presented in the case and, as it was properly limited, did not render defendant’s trial fundamentally unfair. (See *Patino, supra*, 26 Cal.App.4th at p. 1747 [the admission of CSAAS evidence at trial does not render the trial fundamentally unfair]; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 69-70 [the admission of relevant evidence of battered child syndrome does not violate the due process clause of the Fourteenth Amendment].)

B. Ineffective Assistance of Counsel

Defendant contends that his trial counsel was ineffective for failing to object to the prosecutor’s argument that “encourag[ed] the jury to conclude Adriana was credible and [defendant] was guilty because her behavior was consistent with molest victims.” We conclude that defendant’s trial counsel was not constitutionally ineffective for failing to object.

1. Legal Principles

“The standard for showing ineffective assistance of counsel is well settled. ‘In assessing claims of ineffective assistance of trial counsel, we consider whether counsel’s representation fell below an objective standard of reasonableness under prevailing

professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.] Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus.' [Citation.] 'Failure to object rarely constitutes constitutionally ineffective legal representation.' [Citation.]" (*People v. Gray* (2005) 37 Cal.4th 168, 206-207.) A reviewing court may decide an ineffective assistance of counsel claim without addressing both components of the inquiry "if the defendant makes an insufficient showing on one." (*Strickland v. Washington* (1984) 466 U.S. 668, 697.)

2. Analysis

Defendant asserts that his trial counsel was ineffective for failing to object to the prosecutor's argument that Adriana's "actions are very consistent with a child that's been sexually abused" and that Carmichael "said the dissociation can affect how a child appears when discussing the abuse. . . . And we witnessed that on the stand. She would refuse to close her eyes because it took her back to his lap. She's not used to talking about it. Her testimony is consistent with [a] child that's been sexually abused." Defendant also points to the prosecutor's statements that: CSAAS "explains [Adriana's] reaction on the stand"; CSAAS "explains her reaction to her dad when he touched her ribs. Remember, she's revealing for the very first time to her friends"; "And that explains her reaction to her dad"; "We know a lot of children don't disclose. This is very

common. . . . [Carmichael] gave a percentage.” Defendant argues that the prosecutor improperly urged the jury to use the CSAAS evidence as a diagnostic tool.

“Advocates are given significant leeway in discussing the legal and factual merits of a case during argument. [Citation.] However, ‘it is improper for the prosecutor to misstate the law’ ” (*People v. Centeno* (2014) 60 Cal.4th 659, 666 (*Centeno*).)

“When attacking the prosecutor’s remarks to the jury, the defendant must show that, ‘[i]n the context of the whole argument and the instructions’ [citation], there was ‘a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements. [Citation.]’ [Citation.]” (*Id.* at p. 667.)

Although CSAAS evidence is admissible only “for the purpose of showing that the victim’s reactions as demonstrated by the evidence *are not inconsistent* with having been molested” (*Bowker, supra*, 203 Cal.App.3d at p. 394, italics added), we conclude that defendant has not shown “ ‘a reasonable likelihood’ ” that jurors understood the prosecutor to be encouraging them to find defendant guilty based on the CSAAS evidence or to use the CSAAS evidence as a diagnostic tool (*Centeno, supra*, 60 Cal.4th at p. 667). Importantly, the prosecutor prefaced her argument regarding the CSAAS evidence by stating, “[Carmichael’s] testimony about the syndrome is not evidence that the defendant committed any of the crimes. You may consider this evidence only in deciding whether or not Adriana’s conduct was consistent with the conduct of someone who has been molested.” In addition, jurors were instructed that the CSAAS evidence “is not evidence that the defendant committed any of the crimes charged against him. You may consider this evidence only in deciding whether or not Adriana Doe’s conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of that testimony.”

Because defendant has not shown that the prosecutor's argument was improper, he cannot establish that his counsel's performance was constitutionally deficient, as counsel are not expected to voice baseless objections. (See *People v. Price* (1991) 1 Cal.4th 324, 387, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165 ["Counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile"]; see also *People v. Huggins* (2006) 38 Cal.4th 175, 208.)

Moreover, defendant has not established that " 'there could be no conceivable reason for counsel's acts or omissions.' " (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1051.) The failure to object to argument rarely establishes ineffectiveness because "deciding whether to object is inherently tactical" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502.) Rather than objecting, defense counsel addressed the CSAAS evidence in her argument, stating that "[i]t [was] key to remember that [Carmichael] never interviewed anyone in this case" and highlighting the dissimilarities between Adriana's conduct and relationship with defendant and the CSAAS evidence. In addition, defense counsel used some of Carmichael's testimony to affirmatively argue that Adriana may have misconstrued innocent touching in the truck as inappropriate touching. In sum, "counsel could reasonably have chosen not to object. As [the California Supreme Court has] noted . . . , in the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal. [Citation.] Here, defense counsel did not object; rather, [she] countered the prosecution argument with argument of [her] own. . . . We will not second-guess such tactics." (*People v. Frierson* (1991) 53 Cal.3d 730, 749.)

For these reasons, we conclude that defendant's counsel was not ineffective for failing to object to the prosecutor's argument.

IV. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

People v. Cruzrivera
H045463